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No. 92-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Transcontinental Gas Pipe Line Corporation, petitioner, respectfully submits this reply brief in support of its petition for a writ of certiorari.

1. Introduction

Respondents muddy the water with extraneous facts and totally fail to address the strong federal policy favoring arbitration agreements. Respondents ground their argument on the specious proposition that there is not an agreement to arbitrate in this case. They seek to escape the arbitration provision that appears in plain English in the Gas Purchase Agreement by adopting the view of the Eighth Circuit that it doesn't mean anything. In other words, the Respondents say that the Eighth Circuit was correct in nullifying the covenant to arbitrate because it found it to be a nullity. This circular reasoning epitomizes the significant danger to arbitration agreements if the opinion below is not reversed.

The relevant facts are simple. This is a dispute over volumes and prices of gas being purchased under a Gas Purchase Agreement[1]. The parties to the Gas Purchase Agreement are Petitioner and Dakota Gasification Company ("Dakota"), two private, nongovernmental parties. The Gas Purchase Agreement provides that "dispute[s] between the parties arising out of this Agreement . . . shall be tried by arbitration . . ." Pet. App. F-24. The disputes at issue unquestionably arise out of the Gas Purchase Agreement. Petitioner seeks to arbitrate these disputes in accordance with the Gas Purchase Agreement. The district court upheld petitioner's right to do so. *Id.* at B-4.

The Eighth Circuit reversed, holding that the arbitration clause in the Gas Purchase Agreement was nullified by the forum selection clause in a contemporaneously executed Pipeline Affiliates Agreement between petitioner and the Department of Energy ("DOE"). *Id.* at A-5 to A-8. The Pipeline Affiliates Agreement gave DOE the right to reinstate the Gas Purchase Agreement should DOE foreclose on the plant. The forum selection clause of the Pipeline Affiliates Agreement gave DOE the right to sue in federal court to enforce its rights under the Pipeline Affiliates Agreement; but it wholly failed to address disputes arising under the Gas Purchase Agreement. *Id.* at H-10. The court of appeals expanded the forum selection clause in the Pipeline Affiliates Agreement to abrogate and supplant the covenant to arbitrate disputes arising under the Gas Purchase Agreement. *Id.* at A-8. To achieve this result, the court of appeals backhanded two important fundamental principles: (1) that even when read together, it is possible to harmonize the Gas Purchase Agreement's arbitration clause and the Pipeline Affiliates Agreement's forum selection clause to legitimately effectuate both provisions, App. A

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[1] There is also a dispute under a Gas Transportation Agreement that contains a virtually identical arbitration clause. The Eighth Circuit wholly failed to address the covenant to arbitrate in the Gas Transportation Agreement, creating significant uncertainty regarding the effect of its opinion upon that agreement.

at 10; and (2) that cases of ambiguity or conflict should be resolved in favor of arbitration. *Volt Info. Sciences Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Respondents are manifestly wrong when they say that the parties did not agree to arbitrate disputes in this case. Dakota Br. in Opp. 7. The agreement to arbitrate exists in black and white. App. F at 24. Respondents are also manifestly wrong when they say that no relevant legal issues are involved. Fed. Resp. 5. The Eighth Circuit totally ignored the "congressional declaration of a liberal federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. Unless corrected, this case will stand as a roadblock to arbitration in every case where the presumption favoring arbitration should properly apply to resolve conflicting or ambiguous agreements. The issue is compelling; the circuits' opinions are conflicting; and the decision below is not correct.

2. The Respondents Ignore the Written Arbitration Agreement

Dakota acknowledges that "where the parties have agreed to arbitrate, that agreement [must] be enforced." Dakota Br. in Opp. 7. Dakota claims, however, that the parties in this case "had not agreed to resolve disputes through arbitration." *Id.* at 8. The plain language of the Gas Purchase Agreement says otherwise; the covenant to arbitrate is unequivocal. *See* Pet. App. F-24. The Eighth Circuit held in Dakota's favor not because there was no agreement to arbitrate but because, in its view, the forum selection clause of the Pipeline Affiliates Agreement overrides the explicit promise to arbitrate, despite the fact that the dispute arises out of the Gas Purchase Agreement — not the Pipeline Affiliates Agreement, and notwithstanding the presumption favoring arbitration intended by Congress.

The Eighth Circuit's opinion squarely conflicts with *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819

F.2d 400 (3d Cir. 1987). See Pet. 10-11. Dakota's effort to distinguish that case rests upon its manifestly erroneous claim that, unlike *Patten Securities,* this is *not* a case "where the parties have agreed, by contract, to arbitrate." Dakota Br. in Opp. 9. Of course, this is *precisely* such a case.

Dakota further argues that, unlike *Patten Securities,* "the forum selection clause and the arbitration clause . . . could never be effective at the same time." *Id.* That also is manifestly wrong. The forum selection clause speaks only to enforcement of DOE's rights under the Pipeline Affiliates Agreement, while the arbitration clause speaks to disputes arising under the Gas Purchase Agreement. The two clauses obviously can operate simultaneously.

3. The Respondents Sidestep the Conflict Among the Circuits

There is a difference between this case and *Patten Securities,* but it is one that dramatizes the fundamental conflict between the Third and Eighth Circuits. As the dissenting judge below noted, the *Patten Securities* forum selection clause "did not serve an independent purpose as it does in this case." Pet. App. A-13. The only effect of the *Patten Securities* forum selection clause was to dictate the location of an action to enforce the arbitration award. 819 F.2d at 407. Here, however, the forum selection clause has the independent purpose of fixing the location of actions to enforce DOE's rights under the Pipeline Affiliates Agreement. It stands on its own and facially has nothing to do with disputes under the Gas Purchase Agreement. (Dakota and DOE both feign misunderstanding of this point. *See* Dakota Br. in Opp. 10; Fed. Resp. Br. in Opp. 12 n.7.) This means that there was even *less* reason here than in *Patten Securities* to believe that forum selection nullifies arbitration.

Dakota argues that a "critical difference between this case and *Patten Securities* is that the Secretary of Energy was not a party to

the contract with the arbitration clause *and* lacked the authority to agree to such arbitration." Dakota Br. in Opp. 10 (emphasis in original). The first half of this assertion is plainly false. Indeed, it was the very purpose of the Pipeline Affiliates Agreement to insure that DOE became a party to the Gas Purchase Agreement when it foreclosed upon the plant. *See* Pet. App. B-2. The second half of Dakota's assertion may or may not be true but it is, at bottom, irrelevant. Relying upon intragovernmental legal opinions, DOE similarly claims that it lacked authority to "submit controversies to binding arbitration." Fed. Resp. Br. in Opp. 9; *see also Id.* at 6. Even if this were true, it would simply raise a question regarding arbitration with the DOE during the time it was the owner of the plant. But Dakota, not DOE, is the present owner of the plant. There is nothing in fact or in law to suggest that Dakota, a private contracting party, inherited by assignment any form of governmental immunity allowing it to abrogate written contract provisions with impunity. Because the Gas Purchase Agreement expressly conferred the right and duty to arbitrate, as between petitioner and Dakota this case is on all fours with *Patten Securities* and the Eighth Circuit's decision directly conflicts with it.

4. The Respondents Fail to Address the Real Issue

Dakota contends that review is not warranted because, in other cases, the Eighth Circuit has "recogniz[ed] the liberal federal policy favoring enforcement of arbitration agreements." Dakota Br. in Opp. 12. It is true that in other cases the Eighth Circuit has enforced agreements to arbitrate. But that doesn't prove anything because none of those cases involve the issue decided here and in *Patten Securities*. That issue — the proper treatment of multi-contract agreements containing a forum selection clause in one document and an arbitration clause in another — is one of substantial concern under the Federal Arbitration Act because of the proliferation of such conflicting clauses in modern complex busi-

ness transactions. Respondents totally ignore that issue, but it clearly merits the attention of this Court. *See* Pet. 15-17.

Dakota argues, finally, that the decision below is correct. Dakota Br. in Opp. 13-14. Like the Eighth Circuit, Dakota totally ignores the dispositive text of the Federal Arbitration Act. Section 2 of the Act provides that a provision like the arbitration clause of the Gas Purchase Agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." Neither Dakota, DOE, nor the Eighth Circuit has shown that there is any ground for revocation of the Gas Purchase Agreement or any provision in it. The Third Circuit in *Patten Securities* correctly recognized that the mere presence of a forum selection clause does not constitute ground for revocation and thus does not nullify an express covenant to arbitrate. The Eighth Circuit plainly erred in ruling otherwise. *See* Pet. 11-15.

5. The True Identity of the Proper Parties

Both Dakota and DOE place significant emphasis upon the interests of the DOE as a party to this case. But DOE is no longer a party to the Gas Purchase Agreement, nor is it a party to the dispute between petitioner and Dakota under that agreement. Its presence in this case was succinctly explained by the district court as follows: Dakota, "seeking to bolster its position that the legal action should remain in its home town, added [DOE] as a party plaintiff." Pet. App. B-3. DOE's only interest is as Dakota's secured creditor, and "the presence or absence of [DOE] as a party is without effect as the mortgage documents are no longer applicable." *Id.* at B-4. DOE's strenuous contention that it "has no such obligation [to arbitrate]," Fed. Resp. 15 n.9, is therefore wholly beside the point. No one is trying to drag DOE into an arbitration proceeding against its will.

Nonetheless, DOE opposes certiorari on the ground that it was not a party to the Gas Purchase Agreement, *Id.* at 8, and thus

"was not a party to any contract containing an arbitration clause." *Id.* at 16. That claim is flatly false. When DOE foreclosed on its mortgage, it became a party to the Gas Purchase Agreement, and remained so until its assignment to Dakota. Pet. App. B-2.

Unable to escape this truth, DOE suggests the novel theory that its takeover of the plant effectuated a "modified contractual arrangement," one from which the arbitration clause had been excised. Fed. Resp. 10. That is sheer bootstrapping. DOE resorts to this approach once again trying to distinguish *Patten Securities*: "[i]n contrast to the situation presented in *Patten Securities*, there is no need to reconcile a forum selection clause with an arbitration obligation because here there is no obligation to arbitrate." *Id.* at 14. But DOE's "no obligation to arbitrate" position derives solely and exclusively from the Eighth Circuit opinion that the forum selection clause vitiates the arbitration clause. That is the same circular reasoning employed by Dakota and it is precisely the opposite of what the Third Circuit did in *Patten Securities*. The conflict is manifest.

6. Conclusion

The Federal Arbitration Act mandates that federal courts must "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The Eighth Circuit refused to do so here, reasoning instead that the presence of both a forum selection clause and an arbitration clause creates ambiguity that can appropriately be resolved by reading the arbitration clause out of the agreement. This runs directly counter to the decision of the Third Circuit in *Patten Securities* that any doubts raised by a forum selection clause "must be resolved in favor of arbitrability." 819 F.2d at 407.

The decision below, if left standing, will produce precisely the waste and inefficiencies that Congress sought to avoid through enactment of the Federal Arbitration Act: additional burdens on an already congested federal court system; needless multiplication

of litigation costs; and the frustration of privately negotiated agreements. This Court should grant review in order to enforce and reaffirm the federal statutory presumption favoring arbitration. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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